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Local Counsel for Waxie's Enterprises, Inc.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re) Case No. 02-81008-NCD
)
Riscomp Industries, Inc.; RJ Associates;) Chapter 7
Riscomp Aviation Services; CBM Aviation) Adv. No. 04-4124
Services and CBM Industries, Inc.)

Debtor.

**WAXIE'S ENTERPRISES, INC.'S REPLY
MEMORANDUM OF POINTS
AUTHORITIES IN SUPPORT OF
MOTION FOR MORE DEFINITE
STATEMENT**

Timothy D. Moratzka, Trustee for the
Bankruptcy Estate of Riscomp Industries, Inc.;
RJ Associates; Riscomp Aviation Services;
CBM Aviation Services and CBM Industries,
Inc.

[Bankruptcy Rule 7012(b); F.R.C.P. 12(e)]

Plaintiff,

DATE: June 9, 2004
TIME: 11:30 a.m.
COURTROOM: 7 West
PLACE: 301 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

vs.

Waxie Sanitary Supply

Defendant.

1 **REPLY MEMORANDUM OF POINTS AND AUTHORITIES**

2 Waxie's Enterprises, Inc. ("Waxie") respectfully submits the following reply memorandum
3 of points and authorities in support of its motion for a more definite statement on the complaint
4 filed by Plaintiff herein.

5 **I.**

6 **THE COMPLAINT FAILS TO SATISFY THE**
7 **REQUIREMENTS FOR A COMPLAINT UNDER FEDERAL**
8 **RULE 8, MADE APPLICABLE TO ADVERSARY**
9 **PROCEEDINGS UNDER THE BANKRUPTCY CODE BY**
 FEDERAL RULES OF BANKRUPTCY PROCEDURE 7008

10 Contrary to Plaintiff's allegations in its opposition to Waxie's motion for a more definite
11 statement, to satisfy Federal Rule 8, made applicable to adversary proceedings under the
12 Bankruptcy Code by Federal Rules of Bankruptcy Procedure 7008, a complaint must "put the
13 defendant on notice of 'the particular transaction or set of facts' that the plaintiff believes to have
14 caused the complained of injury." *Percy v. San Francisco General Hospital* (1988) 841 F.2d 975,
15 979. The mere recitation of the statutory elements of preference law by Plaintiff does not put
16 Waxie on adequate "notice of the particular transaction or set of facts" for which Plaintiff seeks to
17 recover. *In re Jenkin* (1988) 83 B.R. 733, 735 (holding that mere recitation of the statutory
18 language does not state a cause of action). Given the Code's extremely broad definitions of what
19 constitutes "property" and a "transfer" of property (see sections 541 and 101(54) ["transfer"
20 means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of
21 disposing of or parting with property or with an interest in property, including retention of title as a
22 security interest and foreclosure of the debtor's equity of foreclosure]), the kinds of transactions
23 that can be encompassed within the statutory elements of preference transfer are innumerable and
24 not always predictable. A rule which does not require Plaintiff to plead "any facts" except the
25 statutory elements of a preference claim would eviscerate the pleading requirements. See Fed. R.
26 Bankr. P. 7008/Fed. R. Civ. P. 8(a). Under Federal Rule 8, a complaint must allege sufficient facts
27 to fairly apprise defendant of the nature and basis of the asserted claim and the relief requested.
28 *United States v. Wagner Milk Products, Inc.* (1945, DC Ill) 61 F. Supp. 635.

1 A good test for the adequacy of the notice given by a complaint is to ask whether a
2 defendant could respond to it with an appropriate affirmative defense. For example, can Waxie
3 respond to the preference allegations of Plaintiff's complaint by saying, "No, I gave
4 contemporaneous new value for that transfer, pursuant to section 547c(1), and attached hereto is
5 my invoice showing the value I gave," or "That transfer was made in the ordinary course of
6 business pursuant to section 547c(2)?" The answer is no. With the amorphous allegations set
7 forth in Plaintiff's complaint, no defendant (or Waxie for that matter) could respond to the
8 complaint unless the actual facts were such that a defendant (or Waxie) necessarily had to know
9 the complaint could only be aimed at a particular transaction.

10 It is true that it may not be necessary for Plaintiff's complaint to identify each transfer by
11 check number, date and amount, but at least at a minimum there must be some description of the
12 types of transfers sought to be avoided, such as transfers by cash or check, transfers of real or
13 personal property, transfers by a release of obligations owed to the debtor, etc. Without at least
14 some specification of the kinds of transactions Plaintiff seeks to avoid, Waxie does not have any
15 notice of the "particular transaction or set of facts" for which Waxie must answer, and is incapable
16 of identifying any applicable affirmative defenses.

17 Accordingly, the complaint is insufficient to constitute a complaint for purposes of Federal
18 Rule 8, made applicable to adversary proceedings under the Bankruptcy Code by Federal Rules of
19 Bankruptcy Procedure 7008. The complaint does not adequately identify any transaction. It
20 simply states the elements for an avoidance claim based on preferential transfers. The complaint
21 does not include sufficient information for Waxie to file a response, to assert any of the numerous
22 affirmative defenses that may be available, or even to know what transactions formed the basis of
23 Plaintiff's complaint.

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III.
CONCLUSION.

Based on the foregoing, Waxie's Enterprises, Inc. respectfully requests that the Court order Plaintiff to amend its complaint to comply with a more definite statement under Bankruptcy Rule 7012(b) which incorporates Federal Bankruptcy Rule 12(e) of the Rules of Civil Procedure.

DATED: June 3, 2004

NAIMAN LAW GROUP,
Professional Corporation

By:



RANDALL D. NAIMAN
Attorneys for WAXIE'S ENTERPRISES, INC.

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2 X (BY FACSIMILE) In addition to service by mail as set forth above the counsel or interested
3 party authorized to accept service was also forwarded a copy of said document(s) by
4 facsimile transmission at the telefax number corresponding with his/her name.

5 I declare under penalty of perjury under the laws of the United States of America and of the
6 State of California that the foregoing is true and correct and that this declaration was executed on
7 June 3, 2004, at San Diego, California.

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